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Supreme Court, U.S.
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No. ____ OFFICE OF THE CLERK

In the

Supreme Court of the United States

GERKE EXCAVATING, INCORPORATED,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May the lower courts prohibit the United States Army Corps of Engineers from relying on the plurality opinion in *Rapanos v. United States*, 126 S. Ct. 2208 (2006), to determine federal jurisdiction over wetlands under the Clean Water Act.

LIST OF ALL PARTIES

Petitioner: Gerke Excavating, Incorporated

Respondents: United States of America

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner Gerke Excavating, Incorporated, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Gerke Excavating, Inc. (Gerke), respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The challenged remand order of the Court of Appeals for the Seventh Circuit is reported as *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006), and is attached as Appendix (App.) A.

JURISDICTION

The remand order of the Court of Appeals for the Seventh Circuit was entered on September 22, 2006. That court's denial of the Petition for Rehearing and Suggestion for Rehearing *En Banc* was entered on December 1, 2006. App. B. On February 12, 2007, this Court granted an extension of time in which to file this petition for writ of certiorari to and including April 2, 2007. App. C. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS AT ISSUE

The Clean Water Act (CWA) provides in pertinent part:

> Except as in compliance with this section and section[] . . . 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1311(a) (CWA § 301(a)).

> The Secretary may issue permits, after notice and opportunity for public hearings, for the discharge of dredged or fill materials into the navigable waters at specified disposal sites.

33 U.S.C. § 1344(a) (CWA § 404(a)).

> (5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.
>
> (6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. . . .
>
> (7) The term "navigable waters" means the waters of the United States, including the territorial seas.

33 U.S.C. § 1362(5)-(7) (CWA § 502(5)-(7)).

Federal regulations define "waters of the United States" to mean:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> (2) All interstate waters including interstate wetlands;
>
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie

potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

33 C.F.R § 328.3(a) (2005).

Federal regulations define "adjacent" as "bordering, contiguous, or neighboring." 33 C.F.R. § 328.3(c).

INTRODUCTION

In *Rapanos v. United States*, 126 S. Ct. 2208 (2006), a five Justice majority of this Court overruled the Sixth Circuit determination that federal jurisdiction under the Clean Water

Act extended to inland wetlands solely because they were connected to down stream navigable waters. But this Court split on the basis for federal wetland jurisdiction. A single Justice, concurring in the result, interpreted the Clean Water Act broadly so as to reach any wetland with an undefined "significant nexus" with navigable-in-fact waters, whereas a four Justice plurality interpreted the Clean Water Act more narrowly, concluding the Act only covered traditional rivers, lakes, and streams connected to navigable-in-fact waters, and those wetlands indistinguishable from these covered waters.

Subsequently, this Court granted certiorari in this case, vacated the Seventh Circuit decision, and remanded the case in light of *Rapanos*. On remand, the Seventh Circuit determined the lone concurrence in *Rapanos* was controlling and that federal jurisdiction under the Clean Water Act *must be based* on the "significant nexus" standard thereby prohibiting the Corps of Engineers from relying on the *Rapanos* plurality on remand.

However, the First Circuit expressly rejected the Seventh Circuit's reading of *Rapanos* in this case establishing a clear conflict between the circuits. In *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006), the First Circuit held that Clean Water Act jurisdiction could be established in reliance on *either* the plurality standard *or* the "significant nexus" standard. Moreover, the First and Seventh Circuit rulings conflict with this Court's decision in *Marks v. United States*, 430 U.S. 188, 193 (1977), wherein this Court declared that in fragmented decisions " 'the holding of the Court may be viewed as that position taken by those Members *who concurred in the judgments on the narrowest grounds.*' " Indeed, there is general disagreement among the Circuits as to whether and how *Marks* applies to this Court's split decisions.

Under a literal reading of *Marks*, the "narrowest grounds" in *Rapanos* is the plurality opinion. When Clean Water Act jurisdiction is established under the plurality standard, all five

Justices who concurred in the judgments would agree on the outcome. However, when jurisdiction is established under the undefined "significant nexus" standard, only one Justice who concurred in the judgments would support the outcome. Therefore, the plurality opinion is the "narrowest grounds" and the controlling opinion in *Rapanos*.

Also, because the jurisdictional boundaries established by the plurality opinion are more readily discernible than with the "significant nexus" standard, the plurality standard is the only viable standard for securing the constitutional safeguards of fairness and predictability.

STATEMENT OF THE CASE

The subject wetlands are located on an undeveloped 5.8-acre tract of land in Tomah, Wisconsin, that the owner wished to develop. *United States v. Gerke Excavating, Inc.*, 412 F.3d 804, 805 (7th Cir. 2005). The wetlands are drained by a ditch that runs into a nonnavigable creek that flows into the Lemonweir River, also nonnavigable. *Id.* The Lemonweir runs to the Wisconsin River, a navigable waterway, which empties into the Mississippi River. *Id.*

At the direction of the owner, Gerke Excavating, Inc., removed stumps and topsoil and filled in and graded part of the property using a bulldozer and trucks. *Id.* Subsequently Gerke was charged with filling wetlands without a federal permit under the Clean Water Act and fined $55,000. *Id.* In defense, Gerke argued that the wetlands did not qualify as "waters of the United States" within the meaning of the Clean Water Act. *Id.* at 806. The district court granted summary judgment to the United States on the issue of federal jurisdiction. *Id.* at 805. On appeal, the Seventh Circuit affirmed finding a hydrological connection between the subject wetlands and down stream

navigable waters was a sufficient jurisdictional basis for federal regulation of the subject wetlands. *Id.* at 807-808.

After the Seventh Circuit decision, this Court decided *Rapanos*. A five-justice majority in *Rapanos* adjudged that something more than a "hydrological connection" between a wetland and a traditional navigable water was required to establish federal jurisdiction under the Clean Water Act. But, no single rationale garnered a majority vote. Four Justices, forming a plurality on the Court, determined the Act required limiting federal authority to those "relatively permanent, standing or continuously flowing bodies of water" traditionally recognized as "streams[,] . . . oceans, rivers [and] lakes" that are connected to traditional (or navigable-in-fact) waters. *Rapanos*, 126 S. Ct. at 2225 (Scalia, J.). The plurality would also authorize federal regulation of wetlands abutting these water bodies, but *only if* they contain a continuous surface water connection such that the wetland and the covered water are "indistinguishable." *Id.* at 2234. Ephemeral and insubstantial connections would not suffice. *Id.* at 2225.

Justice Kennedy concurred in the judgment but proposed a broad and undefined "significant nexus" test for determining federal Clean Water Act jurisdiction. *Id.* at 2236 (Kennedy, J., concurring in the result). Under this test, any wetland would be subject to federal regulation if it is deemed to "significantly affect" a traditional navigable waterway. *Id.* at 2248.

The four Justices in the dissent supported the government's view that the agencies could choose to regulate essentially any water body to advance the statutory goal of maintaining the "chemical, physical, and biological integrity of the Nation's waters," *id.* at 2252, *et seq.* (Stevens J., dissenting), but added that they would uphold federal jurisdiction in any case "in which either the plurality's or Justice Kennedy's test is satisfied. . . ." *Id.* at 2265.

Based on that ruling, this Court granted a writ of certiorari in this case, vacated the Seventh Circuit judgment, and remanded the case in light of *Rapanos*. On remand, the Seventh Circuit acknowledged this Court's interpretative rule for split decisions as set out in *Marks* and concluded Justice Kennedy's opinion was decided on the "narrowest grounds" and, therefore, controlling. App. at A-3. The Seventh Circuit reasoned that Justice Kennedy's "significant nexus" test was "narrower" than the plurality test for wetland jurisdiction because Justice Kennedy's approach is less restrictive of federal authority. *Id.* The Seventh Circuit thus concluded the "significant nexus" standard "must govern the further stages of this litigation." App. at A-4.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

In *Rapanos v. United States*, 126 S. Ct. 2208, all factions on this Court lamented the lack of certainty that prevails with respect to federal authority under the Clean Water Act. As Justice Scalia noted in the plurality opinion, the "burden of federal regulation on those who would deposit fill material in locations denominated 'waters of the United States' is not trivial." *Id.* at 2214. "The average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes." *Id.* The Corps of Engineers processes over 85,000 wetland permit applications each year, and the number is growing. *See Conserving America's Wetlands 2006: Two Years of Progress Implementing the President's Goal*, Council on Environmental Quality, 22 (2006). More than $1.7 billion is spent annually by private and public applicants to obtain wetland permits. *Rapanos*, 126 S. Ct. at 2214.

Of equal importance, "[t]hese costs cannot be avoided, because the Clean Water Act 'impose[s] criminal liability,' as well as steep civil fines, 'on a broad range of ordinary industrial and commercial activities.'" *Id.* "In the last three decades, the Corps and the Environmental Protection Agency (EPA) have interpreted their jurisdiction over 'waters of the United States' to cover 270-to-300 million acres of swampy lands in the United States—including half of Alaska and an area the size of California in the lower 48 states." *Id.* at 2215.

Regrettably, this Court was unable to provide the needed certainty in defining the reach of federal authority under the Clean Water Act in *Rapanos*. Instead, this Court produced a split decision with no clear controlling opinion or jurisdictional rationale to guide either public enforcers or private citizens. But the lower courts have exacerbated an already untenable situation by adopting conflicting interpretations of this Court's *Rapanos* decision. More than ever, this Court's intervention is required to set the limits of federal authority under the Clean Water Act. It is not enough to defer this matter to Congress for additional legislation or to the implementing agencies for additional regulation. It would not be prudent for them to act in the face of the current Circuit Court split with competing jurisdictional standards. Therefore, this Court should grant the writ and resolve the conflict.

I

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE A CONFLICT AMONG THE CIRCUITS ABOUT WHETHER FEDERAL JURISDICTION OVER WETLANDS UNDER THE CLEAN WATER ACT *MUST* BE BASED ON A LONE CONCURRENCE IN *RAPANOS*

In *United States v. Johnson*, 467 F.3d 56, the First Circuit expressly rejected the conclusion of the Seventh Circuit in this

case that Justice Kennedy's "significant nexus" standard in *Rapanos* is the "narrowest grounds" and the controlling opinion under *Marks v. United States*, 430 U.S. 188.

In *Marks*, this Court stated that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members *who concurred in the judgments on the narrowest grounds.*'" 430 U.S. at 193 (emphasis added). This test has been recognized as the *only* approach sanctioned by this Court for interpreting its split decisions. *In re Michael Francis Cook*, 322 B.R. 336, 341 (N.D. Ohio 2005) ("The only approach approved by the Supreme Court is the 'narrowest grounds' approach.").

The language of *Marks* was not unique to that case. It derived from this Court's decision in *Gregg v. Georgia*, 428 U.S. 153 (1976). In *Gregg*, this Court examined *Furman v. Georgia*, 408 U.S. 238 (1972), which involved a challenge to the constitutionality of a Georgia death penalty statute. In *Furman*, as in *Rapanos*, five Justices agreed in the judgments, but the Court was split on the legal standard that should be applied to death penalty cases. Two Justices who concurred in the judgments felt that capital punishment was unconstitutional in all cases whereas the other three Justices believed that capital punishment was unconstitutional only in the circumstances presented in that case. Thus in *Gregg*, this Court held: "Since five Justices wrote separately in support of the judgments in *Furman*, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . ." 428 U.S. at 169 n.15.

The Seventh Circuit putatively relied on this interpretive rule in this case, but it changed the wording, and therefore the

test. In its opinion below, the court cited *Marks* for the proposition that

> [w]hen a majority of the Supreme Court agrees only on the outcome of a case and not on the ground for that outcome, lower-court judges are to follow the narrowest ground to which a majority of the Justices would have assented if forced to choose. In *Rapanos*, that is Justice Kennedy's ground.

App. at A-2-3.

This adulterated version of the *Marks* rule allowed the Seventh Circuit in this case to aggregate the four dissenters in *Rapanos* with Justice Kennedy to find five Justices that would support Justice Kennedy's "significant nexus" standard for establishing federal jurisdiction over wetlands under the Clean Water Act. However, the court ignored the more persuasive argument that when the plurality standard is applied to find federal jurisdiction, the result would have the support of all nine Justices. But under *Marks*, finding the support of five Justices is not the test, especially in a case like *Rapanos* where five or more Justices would support more than one opinion. Rather, under *Marks*, lower-court judges are to look at the "narrowest grounds."

The First Circuit in *Johnson* found it curious that the Seventh Circuit in this case equated "narrowest grounds" with the opinion "least restrictive of federal authority." *Johnson*, 467 F.3d at 61. Although the cases on which *Marks* relied involved situations in which the "narrowest grounds" was the least restrictive of federal jurisdiction, the *Johnson* court observed that this was mere coincidence and that it "does not necessarily mean that the Supreme Court in *Marks* equated the 'narrowest grounds' of decision in a case with fragmented decisions to the grounds least restrictive of the assertion of federal authority." *Id.* at 63. "Such an equation," the court stated, "leaves unanswered the question of how one would

determine which opinion is controlling in a case where the government is not a party." *Id.* Given the constitutional issue raised, the court found it "just as plausible to conclude that the narrowest ground of decision in *Rapanos* is the ground most restrictive of government authority (the position of the plurality)," because, the court concluded, "that ground avoids the constitutional issue of how far Congress can go in asserting jurisdiction under the Commerce Clause." *Id.*

In contrast to the Seventh Circuit's reading of *Marks* in this case, the First Circuit offered an alternative. The court opined that the "narrowest grounds" might sensibly be interpreted to mean the "less far-reaching-common ground," *id.* (citing *Johnson v. Board of Regents of the University of Georgia*, 263 F.3d 1234, 1247 (11th Cir. 2001)), or the opinion "most clearly tailored to the specific fact situation before the Court and thus applicable to the fewest cases," (citing Mark Alan Thurmon, Note, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 Duke L.J. 419, 420-21 (1992)). *Johnson*, 467 F.3d at 63.

Relying on *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991), the *Johnson* court noted the D.C. Circuit found "*Marks* is workable—one opinion can be meaningfully regarded as 'narrower' than another—only when one opinion is a logical subset of other, broader opinions." *Johnson*, 467 F.3d at 63-64. "In other words," the First Circuit explained, "the 'narrowest grounds' approach makes the most sense when two opinions reach the same result in a given case, but one opinion reaches that result for less sweeping reasons than the other." *Id.* at 64. According to *Johnson*, *Marks* followed this approach. In *Marks* this Court examined *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of the Commonwealth of Massachusetts*, 383 U.S. 413 (1966), in which a majority of this Court held that a lower court incorrectly concluded a book was obscene and did not have First Amendment protection. Three Justices decided that only

non-obscene materials should receive First Amendment protection while two other Justices concluded that the First Amendment provided an absolute shield against government action. As a logical subset of the other, this Court concluded in *Marks* that the former opinion, providing non-obscene materials First Amendment protections, was the "narrowest grounds" for the judgment and the controlling opinion in the case.

Put another way:

> The Justices supporting the broader legal rule must necessarily recognize the validity of the narrower legal rule. That is, if a statute is found to be constitutionally permissible pursuant to a strict scrutiny standard of review, then it is necessarily permissible pursuant to a rational basis standard of review. From the text of the alternative concurring opinions, it is possible to determine that if all of the Justices apply the narrower rule, the outcome would have been the same.

Ken Kimura, Note, *A Legitimacy Model For The Interpretation Of Plurality Decisions*, 77 Cornell L. Rev. 1593, 1603-1604 (1992).

In *Johnson*, the court noted that the Kennedy "significant nexus" standard in *Rapanos* is not a "logical subset" of the plurality standard for federal jurisdiction over wetlands: "The cases in which Justice Kennedy would limit federal jurisdiction are not a subset of the cases in which the plurality would limit jurisdiction."[1] *Johnson*, 467 F.3d at 64.

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[1] Remarkably, however, the First Circuit failed to consider the obvious possibility that the plurality standard in *Rapanos* is a "logical subset" of the Kennedy standard. It is apparent that the plurality test is comparable to the narrower strict scrutiny standard,

(continued...)

For this reason, the First Circuit rejected the Seventh Circuit's conclusion in this case that under *Marks* Justice Kennedy's lone concurrence is controlling in *Rapanos*. Instead, the First Circuit held that "*Marks* does not translate easily to the present situation," *id.* at 64, and that the "federal government can establish jurisdiction over the target sites if it can meet either the plurality's or Justice Kennedy's standard as laid out in *Rapanos*." *Id.* at 66. This conflict creates a substantial disparity between these Circuits in the enforcement of the Clean Water Act which requires reconciliation by this Court.[2]

II

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE A CONFLICT AMONG THE CIRCUITS ABOUT WHETHER *MARKS* APPLIES TO THIS COURT'S SPLIT DECISIONS SUCH AS *RAPANOS*

The *Johnson* court points out that a number of Circuits have abandoned this Court's *Marks* approach to split opinions

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[1] (...continued)
mentioned in the analogy above, whereas the Kennedy "significant nexus" test is comparable to the broader rational basis standard. As Justice Stevens observed, Justice Kennedy's approach "treats more of the Nation's waters as within the Corps' jurisdiction" and it would be an "unlikely event that the plurality's test is met but Justice Kennedy's is not." *Rapanos*, 126 S. Ct. at 2265 n.14 (Stevens, J., dissenting).

[2] In addition to the Seventh Circuit in this case, the Ninth Circuit has also concluded, without explanation, that Justice Kennedy's "significant nexus" standard is controlling in *Rapanos* under the *Marks* rule thus creating an additional conflict among the Circuits. *See Northern California River Watch v. City of Healdsburg*, 457 F.3d 1023, 1029 (9th Cir. 2006) (currently on petition for rehearing).

or applied *Marks* selectively. Instead, they have sought to divine the controlling opinion in this Court's fragmented decisions, like *Rapanos*, by adopting a "pragmatic" approach to the situation. This approach involves assessing which grounds would "command a majority of the Court." *Johnson*, 467 F.3d at 64. In *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1182 (2d Cir. 1992), for example, the court concluded: "In essence, what we must do is find common ground shared by five or more justices." *See also United States v. Williams*, 435 F.3d 1148, 1157 (9th Cir. 2006) ("We need not find a legal opinion which a majority joined, but merely 'a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree.' "

The courts that have adopted this approach are not particular as to the Justices that may be joined in a "majority." In contrast to the directive in *Marks,* that the controlling opinion must be found among those Justices who concurred in the judgments, some Circuits give equal weight to the dissenting Justices. The Seventh Circuit in this case, which purported to apply *Marks*, relied on the fact that "any conclusion that Justice Kennedy reaches in favor of federal authority over wetlands in a future case will command the support of five Justices (himself plus the four dissenters)." App. at A-4. The *Johnson* court used similar logic to justify its determination that federal jurisdiction over wetlands could be established under either the plurality standard in *Rapanos* or the Kennedy standard:

> If Justice Kennedy's test is satisfied, then at least Justice Kennedy plus the four dissenters would support jurisdiction. If the plurality's test is satisfied, then at least the four plurality members plus the four dissenters would support jurisdiction.

Johnson, 467 F.3d at 64.

In *Student Public Interest Research Group of New Jersey, Inc. v. AT & T Bell Labs*, 842 F.2d 1436 (3d Cir. 1988), the Third Circuit examined *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987), to determine the controlling opinion. In *Pennsylvania*, this Court was asked to address the availability of contingency fees under federal fee-shifting statutes. This Court split along the lines of *Rapanos* with four Justices in the plurality, four Justices in the dissent, and Justice O'Connor's lone concurrence in the judgments. The Third Circuit determined that "[b]ecause the four dissenters would allow contingency multipliers in all cases in which Justice O'Connor would allow them, her position commands a majority of the Court" and is controlling. *Student*, 842 F.2d at 1451.

In *King v. Palmer*, *supra*, the D.C. Circuit took a different approach. According to *Johnson*, the D.C. Circuit "refused to examine the points of commonality among Justice O'Connor's opinion and that of the dissent, relying mainly on a literal reading of *Marks's* [sic] language that the holding is the position of the Justices '*who concurred in the judgments* on the narrowest grounds.' " *Johnson*, 467 F.3d at 65. The D.C. Circuit relied as well on the fact that this Court "had not explicitly applied *Marks* to situations where concurring and dissenting votes would be combined." *Id.*

This widespread circuit conflict has not gone unnoticed by this Court. This Court has remarked on how the *Mark's* inquiry has "so obviously baffled and divided the lower courts that have considered it." *Nichols v. United States*, 511 U.S. 738, 745-746 (1994). It is time, therefore, for this Court to address this conflict in the context of this case.

III

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI BECAUSE THE UNDEFINED "SIGNIFICANT NEXUS" STANDARD IMPOSED BY THE COURT BELOW RAISES DUE PROCESS CONCERNS

In more than 30 years, the Corps and EPA have failed to follow a consistent jurisdictional test under the Clean Water Act. A report from the General Accounting Office confirms that the Army Corps of Engineers' local districts "differ in how they interpret and apply the federal regulations when determining what wetlands and other waters fall within the [Act's] jurisdiction." U.S. General Accounting Office, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices In Determining Jurisdiction* 3 (Feb. 2004), *available at* http://www.gao.gov/new.items/ d04297.pdf (last visited Feb. 15, 2007) (GAO Report).

In addition to the inter-district inconsistences, the GAO Report concludes that even Corps staff working in the same office cannot agree on the scope of the Clean Water Act and that "three different district staff" would likely make "three different assessments" as to whether a particular water feature is subject to the Clean Water Act. GAO Report at 22. This is more than a theoretical concern. This degree of uncertainty permeates the enforcement decisions of the Corps. In *Rapanos*, those decisions became the basis for multimillion dollar fines and criminal prosecution. And, in this case, Gerke was fined $55,000 for filling inland wetlands without a federal permit.

The right of the people to know when they have violated the law is deserving of greater safeguard than the convenience of the enforcing agency. But the scope of federal jurisdiction under the Clean Water Act is beyond the comprehension of ordinary people. The very definition of "wetlands" defies common sense. Federal regulations define "wetlands" as those

areas "inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. § 328.3(b). Under this definition, an area need be wet only "for one to two weeks per year" to qualify as a "wetland." Gordon M. Brown, Comment, *Regulatory Takings and Wetlands: Comments on Public Benefits and Landowner Cost*, 21 Ohio N.U. L. Rev. 527, 529 (1994). In other words, a "wetland" may be mostly dry land.[3]

No reasonable person would conclude that mostly dry land is subject to federal control as a jurisdictional wetland. Ocie Mills and his son found this out the hard way. These two were convicted for filling "wetlands" on their property without a permit—an act a district court characterized as the innocuous placing of clean fill on dry land:

> This case presents the disturbing implications of the expansive jurisdiction which has been assumed by the United States Army Corps of Engineers under the Clean Water Act. In a reversal of terms that is worthy of *Alice in Wonderland*, the regulatory hydra which emerged from the Clean Water Act mandates in this case that a landowner who places clean fill dirt on a plot of subdivided dry *land* may be imprisoned for the statutory felony offense of "discharging pollutants into the navigable waters of the United States."

United States v. Mills, 817 F. Supp. 1546, 1548 (N.D. Fla. 1993).

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[3] The definition of "discharge" also defies common sense. The Corps interprets that term to mean the mere movement of dirt in situ. *See Borden Ranch Partnership v. United States Army Corps of Engineers*, 261 F.3d 810 (9th Cir. 2001).

For this offense, Mills and his son served 21 months in prison, one year in supervised release, paid $5,000 in fines, and were required to restore the site to its original condition. *Id.*

This Court has long held that "before a man can be punished as a criminal under the Federal law his case must be 'plainly and unmistakably' within the provisions of some statute." *United States v. Gradwell*, 243 U.S. 476, 485 (1917). *See also United States v. Lanier*, 520 U.S. 259, 267 (1997). But the "significant nexus" test provides no such clarity. To the contrary, as the *Rapanos* plurality points out, "Justice Kennedy's 'significant nexus' standard is perfectly opaque. When, exactly, does a wetland 'significantly affect' covered waters, and when are its effects 'in contrast . . . speculative or insubstantial?'" *Rapanos*, 126 S. Ct. at 2235 n.15.

Similar questions were raised by the district court in *United States v. Chevron Pipe Line Company*, 437 F. Supp. 2d 605, 613 (N.D. Texas 2006), the first case to apply the *Rapanos* decision. That case involved an accidental discharge of oil into a dry, unnamed drainage ditch that flowed only during significant storm events. *Id.* at 607. Although the oil was cleaned up before it reached any water, as required by state law, and the nearest navigable-in-fact waterway was connected to the ditch by intermittent streams scores of miles away, the Corps of Engineers sought fines from the company for discharging into "navigable waters" without a federal permit. *Id.* at 607-608. Therefore, the court looked to *Rapanos* for guidance in determining the scope of federal jurisdiction.

The court was quick to dismiss the Kennedy approach as an unworkable standard. The court observed that Justice Kennedy "advanced an ambiguous test—whether a 'significant nexus' exists to waters that are/were/might be navigable." *Id.* at 613. According to the court, "[t]his test leaves no guidance on how to implement its vague, subjective centerpiece. That is, exactly what is "significant' and how is a 'nexus' determined?"

Id. at 613 (citations omitted). Therefore, instead of relying on the Kennedy opinion, the court based its decision on existing Fifth Circuit precedent and "the Supreme Court's plurality opinion in *Rapanos v. United States*" and concluded there was no federal jurisdiction. *Id.* at 614. That decision underscores the real world difficulties that are created for the enforcing agencies and the trial courts when this Court does not provide clear limits on federal authority.

Thus, the "significant nexus" standard imposed by the court in this case, and offered alternatively in *Johnson,* is sure to result in inconsistent and unpredictable applications of the law. Only the plurality test, with its clearer lines of demarcation, is likely to provide agency officials and the regulated public with consistent and predictable jurisdictional rules. As the dissent in *Johnson* observed, the "significant nexus" approach "leaves the door open to continued federal overreach" while the plurality's restriction on federal jurisdiction "strikes a constitutional balance" between federal power and individual rights. *Johnson*, 467 F.3d at 66-67 (Torruella, Circuit Judge, dissenting).

CONCLUSION

The Seventh Circuit decision in this case directly conflicts with a decision of the First Circuit and prohibits the Corps of Engineers from relying on the plurality opinion in *Rapanos* that, when applied to find federal jurisdiction over inland wetlands, would have the support of all nine Justices on this Court. Additionally, the circuits are split on the application of *Mark's* generally. These conflicts require resolution by this Court. Inaction by this Court will result in continuing uncertainty as to

Clean Water Act jurisdiction and undermine the Constitution's safeguards against arbitrary enforcement of the law.

DATED: April, 2007.

Respectfully submitted,

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Counsel for Petitioner

Appendix A-1

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 04-3941

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GERKE EXCAVATING, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 03-C-0074-C–**Barbara B. Crabb**, *Chief Judge.*

On Remand From the
Supreme Court of the United States

SEPTEMBER 22, 2006

Before POSNER, EASTERBROOK, and EVANS, *Circuit Judges.*

PER CURIAM. This suit charges that the defendant, Gerke Excavating, violated the Clean Water Act by discharging pollutants into "navigable waters" from "point sources" without having obtained the permit from the Corps of Engineers that is required if the pollutant consists of dredge or fill material. 33 U.S.C. §§ 1311(a), 1362(12). The district judge granted

summary judgment for the government and imposed a civil penalty. We affirmed. 412 F.3d 804 (7th Cir. 2005). Gerke filed a petition for certiorari. The Court granted the petition, 126 S. Ct. 2964 (2006), and remanded the case to us for further consideration in light of *Rapanos v. United States*, 126 S. Ct. 2208 (2006), where the Court reversed two judgments by the Sixth Circuit upholding federal authority over wetlands, as had we.

There was, however, no majority opinion in *Rapanos*. Four Justices, in an opinion supporting reversal, wanted to limit federal authority over "navigable waters" to "those wet-lands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the [Clean Water Act]. Wetlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States' . . . thus lack the necessary connection to covered waters that we described as a 'significant nexus.' Thus, establishing that wetlands such as those at the Rapanos and Carabell sites are covered by the Act requires two findings: First, that the adjacent channel contains a 'wate[r] of the United States,' (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id.* at 1226-27 (citations omitted).

Justice Kennedy concurred in the judgment to reverse but not in the plurality opinion. The four dissenting Justices took a much broader view of federal authority; Justice Kennedy criticized them as well as criticizing the plurality.

When a majority of the Supreme Court agrees only on the outcome of a case and not on the ground for that outcome,

lower-court judges are to follow the narrowest ground to which a majority of the Justices would have assented if forced to choose. *Marks v. United States*, 430 U.S. 188, 193 (1977). In *Rapanos*, that is Justice Kennedy's ground.

The plurality Justices thought that Justice Kennedy's ground for reversing was narrower than their own, because they concluded their extensive and in places harsh criticism of the concurrence by saying that "Justice KENNEDY tips a wink at the agency [i.e., the Corps of Engineers], inviting it to try its same expansive reading again." 126 S. Ct. at 2234 n.15. Justice Kennedy expressly rejected two "limitations" imposed by the plurality on federal authority over wetlands under the Clean Water Act, one being the requirement of a "continuous surface connection" between the wetland and the conventional waterway that it abuts. *Id.* at 2242 (concurring opinion). He accused the majority of being "unduly dismissive of the interests asserted by the United States in these cases. Important public interests are served by the Clean Water Act in general and by the protection of wetlands in particular." *Id.* at 2246.

The test he proposed is that "wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.' When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" *Id.* at 2248. This test is narrower (so far as reining in federal authority is concerned) than the plurality's in most cases, though not in all because Justice Kennedy also said that "by saying the Act covers wetlands (however remote) possessing a surface-water connection with a continuously flowing stream (however small), the plurality's reading would permit applications of the

statute as far from traditional federal authority as are the waters it deems beyond the statute's reach." *Id.* at 2246.

Thus, any conclusion that Justice Kennedy reaches in favor of federal authority over wetlands in a future case will command the support of five Justices (himself plus the four dissenters), and in *most* cases in which he concludes that there is no federal authority he will command five votes (himself plus the four Justices in the *Rapanos* plurality), the exception being a case in which he would vote against federal authority only to be outvoted 8-to-1 (the four dissenting Justices plus the members of the *Rapanos* plurality) because there was a slight surface hydrological connection. The plurality's insistence that the issue of federal authority be governed by strict rules will on occasion align the Justices in the plurality with the *Rapanos* dissenters when the balancing approach of Justice Kennedy favors the landowner. But that will be a rare case, so as a practical matter the Kennedy concurrence is the least common denominator (always, when his view favors federal authority).

Justice Kennedy's proposed standard, which we conclude must govern the further stages of this litigation, requires factfinding not yet undertaken by the district court. We therefore remand the case to that court for such further proceedings as may be necessary to apply the standard.

REMANDED WITH DIRECTIONS.

No. 04-3941

A true Copy:

Teste:

_____

Clerk of the United States Court
of Appeals for the Seventh Circuit

Appendix B-1

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 1, 2006

Before

Hon. Frank H. Easterbrook, *Chief Judge*

Honorable Richard A. Posner, *Circuit Judge*

Hon. Terence T. Evans, *Circuit Judge*

No. 04-3941

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. GERKE EXCAVATING, INC., *Defendant-Appellant.*	Appeal from the United States District Court for the Western District of Wisconsin. No. 03-C-0074-C Barbara B. Crabb, *Chief Judge.*

ORDER

On September 29, 2006, plaintiff-appellee filed a motion to clarify the opinion of this court dated September 22, 2006. On October 5, 2006, defendant-appellant filed a petition for rehearing with suggestion for rehearing *en banc*, and on November 2, 2006, plaintiff-appellee filed an answer to the petition. All the judges on the original panel have voted to deny the petition, and none of the judges in regular active service has

requested a vote on the petition for rehearing *en banc*. The petition and the motion are therefore **DENIED**.

Appendix C-1

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

February 12, 2007

Mr. M. Reed Hopper
Pacific Legal Foundation
3900 Lennane Drive
Suite 200
Sacramento, CA 95834

Re: Gerke Excavating, Inc.
v. United States
Application No. 06A782

Dear Mr. Hopper:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on February 12, 2007 extended the time to and including April 2, 2007.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

by /s/ Clayton Higgins

Clayton Higgins
Case Analyst

Appendix C-2

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

NOTIFICATION LIST

Mr. M. Reed Hopper
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3900 Lennane Drive
Suite 200
Sacramento, CA 95834

Mr. Paul D. Clement
Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Room 5614
Washington, DC 20530-0001

Clerk
United States Court of Appeals for the Seventh Circuit
219 S. Dearborn Street, Room 2722
Chicago, IL 60604